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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1563

JORDAN C. WAITE, ET AL,
Petitioners,

versus

F. P. PLAZA, INC., ET AL,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI

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IN THE
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OPINIONS BELOW

The opinion of the Supreme Court of the State of Georgia printed in Appendix B of the Petition is reported in 230 Ga. 161, and the denial of rehearing is reported in 230 Ga. 165.

JURISDICTION

Respondents acknowledge that jurisdiction of this Court is requested under 28 U.S.C. §1257(3) but respectfully submit that no substantial Federal question is presented.

QUESTIONS PRESENTED

Where the subject zoning ordinance provides notice of Planning Board Hearings by:

1. A sign posted conspicuously on the property not less than six feet square, containing information as to the change in zoning classification and the pertinent data of the hearing to be posted at least two weeks before the hearing; and

2. Similar notice by regular mail to all property owners within 300 feet of the subject property as ownership and addresses appear on the tax records of Fulton County; and

as to Board of Commissioners Hearings by:

1. Notice published once a week for three weeks in the newspaper in which sheriff's advertisements are published and that notice of the Planning Board hearing and the Board of Commissioner's hearing may be given simultaneously; pursuant to the requisites of the State Enabling Act, and where the ordinance provides for public hearings without restriction; are not the tenets of procedural due process and equal protection met as to residents of an adjoining county who have notice and attend the public hearings.

SUMMARY OF ARGUMENTS

1. The lower decision does not represent a departure from prior decisions interpreting due process and

equal protection issues regarding legislation establishing the power to zone property under the police power.

2. The instant case turns upon its own peculiar facts and does not involve a substantial Federal question.

3. The notice requirements of the ordinance meet and exceed the rudiments of due process and equal protection of the United States Constitution, as interpreted by this Court.

4. The notice requirements of the subject ordinance were complied with, and Petitioners had actual notice and attended the public hearings prior to exercise of the zoning power.

STATEMENT OF THE CASE

On September 15, 1971, Respondents F. P. Plaza, Inc. (Defendants in the Trial Court and Appellants in the Georgia Supreme Court) filed zoning petitions in the Fulton County Zoning Administrator's Office, requesting rezoning of certain properties in Fulton County from R-2 (Residential) to O-I (Office-Institutional). The subject property and the surrounding Fulton County properties were set forth on scheduled plats drawn by the Fulton County Zoning Administrator.

It is undisputed that the subject property was entirely within the jurisdiction of Fulton County, with a conspicuous sign posted on the property prior to the Planning Board Hearing which advertised both the Hearing before the Planning Board and the Board of Commis-

sioners. The advertisement of the Zoning Applications were published in the Fulton County *Daily Report* on October 6, 13, and 20 of 1971, prior to the Planning Board Hearing and the hearings of the Fulton County Commissioners, in compliance with the directives of the Fulton County Zoning Ordinance, Article XXVIII, Sections 3 and 4. The advertisement gave the date and place of both hearings. The Enabling Act only requires notice by advertisement. The Ordinance requires three composite forms of notice, i.e., posting the property conspicuously, publication in the official county organ, and notification to those residents of Fulton County who reside within three hundred feet of the subject property, as their names appear on the Fulton County Tax Digest. It is undisputed that the statutory requirements of notice were complied with by Respondents.

Subsequent to the initial Planning Board meeting, a public hearing was held by the Fulton County Board of Commissioners on November 7, 1971, at which time the Commissioners voted to defer action on each of the particular petitions. The matter was reheard on April 5, 1972, and May 3, 1972. The named Plaintiffs (DeKalb County residents) submitted letters and petitions to the Fulton County Zoning Commissioners [R-120-144][1] and were in attendance at the various public hearings.

Due to the Fulton County Board of Commissioners imposition of a different use, T-R (Townhouse-Residential), on a portion of the subject property, for which

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[1]Reference is to unprinted certified transcript of the record numbered pages.

T-R use no application had been made, requested, nor advertised, the Board's action was not binding in this regard. Therefore, the subject property was again considered at the June 7, 1972, public meeting when final action was taken and the entire property was zoned O-I. Petitioners' filed their action on June 2, 1972, seeking and obtaining after hearing, entry of certain injunctive restraints. The Trial Court expressly did not enjoin or impede the legislative actions of the Fulton County Board of Commissioners, which adopted a rezoning resolution, rezoning the property in its entirety to O-I, as applied for, requested, and advertised.

Subsequently, the Trial Court entered its Order of July 11, 1972, and, upon its definition of due process and equal protection, stated, as a matter of fact and law, that the Petitioners were denied due process and equal protection under the applicable zoning regulations of Fulton County and the actions of the Board of Commissioners pursuant thereto.

The Georgia Supreme Court reversed the Trial Court and held the Georgia Enabling Act and Fulton County Zoning Resolution did not violate the due process or equal protection guarantees of the Georgia and the United States Constitutions. The Georgia Supreme Court held that the composite means of notice, provided in the Fulton County Zoning Resolution, i.e. (1) publication, (2) posting, and (3) mailed notice to those owners of property within three hundred feet of the subject property, as listed in the Fulton County Tax Records, satisfied the requirements of the Georgia En-

abling Act and the requirements of procedural due process and equal protection.

REASONS FOR DENYING THE WRIT

The decision of the Supreme Court of Georgia does not represent even a small departure in legal reasoning from any of this Court's decisions on due process and equal protection. Both the Georgia Enabling Act and the Zoning Ordinance (Ga. Laws 1939, p. 584; Ga. Laws 1952, p. 2689; Ga. Laws 1968, p. 3769), enacted pursuant thereto, provide for express means of notice and hearing prior to exercise of the police power in effecting zoning regulations within the Fulton County jurisdiction.

Secondly, the instant case arises because the Petitioners take issue with the Zoning Ordinance of the adjacent county in the rezoning of certain parcels, totally contained within that county, due to the proximity of the subject property to the county line. The Georgia Court merely decided that, based upon the unique facts in this case, the composite notice of posting, publication, and mailing satisfied the basic necessities of due process and equal protection. It further determined that a rational basis had been established for the mailing of notice to certain county residents (those within three hundred feet of the subject property) who appeared as property owners on the Fulton County Tax Digest. Thus, the case turns upon its own peculiar facts and not upon the law applied.

REQUIREMENTS OF NOTICE

To summarize the legal notice required as to zoning in Fulton County, the enabling statute states that as to the Planning Board Hearing, notice to interested parties shall be in accordance with the rules and regulations adopted by the authorities in charge of county affairs. As to the hearing before the Board of Commissioners, the statute states that notice thereof shall be published prior to the holding of the same, such notice to state the nature of the proposed change and the date, hour and place of the meeting.

The requirements of notice set out in the rules and regulations of the Fulton County Comprehensive Zoning Resolution, are as follows:

Planning Board Hearing:

1. A sign must be posted conspicuously on the property not less than six feet square, containing information as to the change in zoning classification and the date of the hearing. The sign must be posted at least two weeks before the hearing.

2. Similar notice by regular mail shall be given to all property owners within 300 feet of the subject property. Said notice shall be mailed to property owners as ownership and addresses appear on the tax records of Fulton County.

Hearing before Board of Commissioners:

The Comprehensive Zoning Resolution states that the Board of Commissioners shall hold a public hearing at the first regular meeting following the hearing by the Planning Board, notice of which shall be given once a week for three weeks in the newspaper in which sheriff's advertisements are published and that notice of the Planning Board hearing and the Board of Commissioner's hearing may be given simultaneously.

The record in this case shows that the notice by sign posting and the notice by mailing, as well as the advertisement notice gave complete information about both hearings.

ACTUAL NOTICE RECEIVED

The Petitioners are residents of an adjoining county and claim that notice was not sufficient as to them and that they lived nearby. They particularly complain because the requirements of notice by mailing did not provide for notice to property owners in adjoining counties. They also say notice should have been given to nearby residents as well as property owners — which is accomplished by the conspicuous posting and newspaper advertisement.

Respondents state that not only the legal requirements for notice were complied with, but as a practical matter, all of the complaining parties did have notice of both hearings (Planning Board and Board of Commissioners) and attended them. There was no

evidence whatsoever that any of the Petitioners suffered for lack of notice in any way because they were in another county. They lived near the property and evidently read the sign, read the ad, or heard from their Fulton County neighbors because they attended the hearings en masse and submitted petitions [R-120-144].[2]

It is the position of respondents that the legal requirements for notice of hearings were adequate and constitutional, and that the parties complaining were aware of the hearings and attended the same.

Furthermore, there is little question that posting and publication are reasonable means of notice and are, in fact, the usual and accepted means in similar legislative, as opposed to judicial, actions of a governmental entity. *Aquino v. Tobriner*, 298 F.2d 674 (1961). With regard to the equal protection argument, presented by Petitioners, a review by this Court would have little, if any, effect on future litigants since the case arises only because of the proximity of the subject land to a county boundary.

As will be shown below, there is no real question that Plaintiffs failed to present a tenable basis to contest the Fulton County Zoning Ordinance on the basis of due process or equal protection.

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[2] Reference is to unprinted certified transcript of the record numbered pages.

DUE PROCESS

The elementary and fundamental requirements of due process in any proceeding which is to be accorded finality are hearing and notice of hearing prior to deprivation of any fundamental rights. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136. In the instant case, there is no dispute as to the adequacy of the hearing. The only issue raised by Petitioners questions the matter of sufficient notice. It is well settled that due process requires no particular form of notice but only requires notice that is reasonably designed to afford the parties actual notice of hearing. *Hanna v. Plumer, Supra.* It is undisputed that Respondents complied with the requirements of the Fulton County Zoning Ordinance. All specified forms of notice were timely given; and Petitioners did, in fact, have actual knowledge of the preliminary hearings.

The Enabling Act of the Georgia Laws and the Fulton County Zoning Ordinance, pursuant thereto, clearly meet the State of Georgia directives of due process, as set forth in *Sikes v. Pierce*, 212 Ga. 567, 94 S.E.2d 427 (1956); *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940). However, the instant case is not one of a judicial action, condemnation, foreclosure or other process affecting property, but is an exercise of the police power in enacting zoning regulations affecting property within the Fulton County jurisdiction.

The test is whether the means of notice and hearing are in the interest of the community and are reasonable in relation to the subject matter. Petitioners rely

on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). *Mullane* arises out of a judicial proceeding and, therefore, ignores the need to balance the competing interests of the governmental entity with those of the individual. *Boulware v. Battaglia*, (D.C. Del. 1972), 344 F.Supp. 889. The type of proceedings and rights affected will determine if personal notice or constructive notice will suffice. *Jacob v. Roberts*, 223 U.S. 261, 56 L.Ed. 429, 32 S.Ct. 303 (1912); *Ballard v. Hunter*, 204 U.S. 241, 51 L.Ed. 461, 27 S.Ct. 26 (1907).

Petitioners, as DeKalb County residents, take issue with the Zoning Ordinance of Fulton County, which requires publication of notice in the official newspaper of Fulton County and conspicuous posting of the property. It is clear that the Petitioners have no direct ownership or claim to the property, the subject of the zoning procedure.

Petitioners have not, as residents of an adjoining county, demonstrated that further notice is essential, workable, or reasonable in Fulton County's (the governing jurisdiction) exercise of the police power. The Petitioners clearly failed to show that, as residents of an adjacent but distinct jurisdiction, their names and addresses were easily ascertainable and accessible to the Fulton County Board of Commissioners in administering the rezoning of certain Fulton County property. The notice and hearing requirements, set forth in the Ordinance, comply with the directives of this Court relative to procedural due process in the legislative functions of government under the police

power. If Petitioners have any complaint whatsoever with respect to the *additional* (mailed) notice, it must fall under the doctrine of equal protection.

EQUAL PROTECTION

The question presented with regard to equal protection is whether the classification of recipients of the mailed notice in rezoning proceedings constitutes an irrational, invidious discrimination, lacking *any* compelling State interest.

It is evident from the facts that DeKalb County residents are not general participants in the electoral and political process of Fulton County. They are subject neither to the taxation powers of Fulton County, nor to assessments for improvements within Fulton County borders. There is a definite division and dichotomy between the two counties and their residents. Therefore, there is a rational basis for distinction and classification of the notice (publication and posting), afforded DeKalb County residents in the *in rem* zoning proceedings, as compared with the notice afforded those Fulton County residents who reside within three hundred feet of the subject property.

Neither the constitutional requirements of equal protection nor of due process prohibits classification between different groups so long as a reasonable basis for that distinction exists. *Whitney v. State Tax Commissioner of New York*, 309 U.S. 530, 60 S.Ct. 635, 84 L.Ed. 909 (1940). The Supreme Court of the State of Georgia has concurred with this principle and has up-

held the notice classification as having a rational basis. Furthermore, as stated in *Powell v. Power*, 436 F.2d 84, (2nd Cir. 1970):

> "Uneven or erroneous application of an otherwise valid statute, constitutes a denial of equal protection *only* if it represents intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8, 84 S.Ct. 397, 88 L.Ed. 497 (1944). See *Swain v. Alabama*, 380 U.S. 202, 204, 205, 85 S.Ct. 824 13 L.Ed.2d 739 (1965); *Oyler v. Boles*, 368 U.S. 488, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) ... [W]e cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error." [Emphasis supplied.]

Further definition, as given in *Grunewald v. Gardner*, 390 F.2d 591, (2nd Cir. 1968), at Page 592:

> "It is only the invidious discrimination or the classification which is patently arbitrary and utterly lacking in rational justification which is barred by either the due process or equal protection clauses. *Fleming v. Nester*, 360 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The state has a wide scope of discretion in creating legislative classifications and according different treatment to members of the differing classes. *McGowan v. State of Maryland*, 366 U.S. 420,

> 425 (1961). The only limitation which the equal protection clause places on this power is that a classification must rest upon some real difference which bears a reasonable relationship to a legitimate legislative purpose. See *Gulf, Colorado, and Santa Fe Railroad v. Ellis,* 165 U.S. 150, 155-157 (1897)."

Fulton County mailed notice to Fulton County property owners who, of record, owned property within three hundred feet of the subject property. The classification is reasonable, workable, and rationally consistent with the interests of the community — the county having jurisdiction. Therefore, it meets the requisites of the constitutional standard. *West Coast Hotel v. Parish,* 30 U.S. 379, 391, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

Further, this Court has recently held that, even if a procedure would result in a disadvantage to one group, the disadvantage does *not* necessarily deem the law unconstitutional as violative of equal protection. *James v. Valtierra,* 402 U.S. 137, 142, 28 L.Ed.2d 678, 91 S.Ct. 1331 (1971). Therein this Court stated, at Page 142:

> "But of course a law making procedure [which] disadvantages a particular group does not always deny equal protection. Under any such holding, presumably a state would not be able to require referendums on any subject unless referendums are required on all, because they would always disadvantage some

> group. And this Court would be required to analyze governmental structures to determine whether gubernatorial veto provisions or a filibuster was likely to 'disadvantage' any of the diverse and shifting groups that make up the American people."

This Court has further stated, in the landmark decision of *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153 L.Ed.2d 491 (1970) [which case, despite the existence of factual differences from the case at Bar, states the constitutional standard]:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. *Lindsey v. Natural Carbonic Gas Company*, 220 U.S. 61, 78, 55 L.Ed. 369, 31 S.Ct. 337. The problems of government are practical ones and may justify, if they do not require, rough accommodations . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L.Ed.2d 393, 81 S.Ct. 1101."

The legitimate governmental interest of the Fulton County Board of Commissioners in administering the

exercise of the police power in the zoning area has been stated above. The equal protection clause does not compel uniformity in the face of difference nor sacrifice the governmental interest in making realistic and reasonable distinctions in classifications. *Whitney v. State Tax Commissioner of New York, Supra.* The requirements of the Georgia Enabling Act and the Fulton County Zoning Ordinance are not prohibitive, arbitrary, nor capricious classifications effected to intentionally discriminate. Rather they are effected for the continuing function of the governmental entity.

There is neither a substantial Federal question presented in the instant matter, nor a question which is likely to be of any continuing significance. The matter arises from a unique situation and is brought by Petitioners who take issue with an adjoining county's zoning ordinance provision relative to mailed notice after having received notice via conspicuous posting and publication.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for writ of certiorari does not present a substantial Federal question and should be denied since the decision of the Supreme Court of Georgia is not in conflict with the United States Constitution or any decision of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 1973, three copies of the petition for Writ of Certiorari were mailed, postage prepaid, to each party separately represented in the proceeding and required to be served pursuant to Rule 33(1) and (3), Rules of the Supreme Court of the United States.

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versus

F. P. PLAZA, INC., ET AL,

Respondents

SUPPLEMENTAL BRIEF OF PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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SUPREME COURT
UNITED STATES OF AMERICA

NO. 72-1563

JORDAN C. WAITE, ET AL,

Petitioners

versus

F. P. PLAZA, INC., ET AL,

Respondents

SUPPLEMENTAL BRIEF OF PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The petitioners Jordan C. Waite, et al., respectfully file this their supplemental brief to petition for Writ of Certiorari pursuant to Rule 24, Rules of the Supreme Court of the United States, to call attention to a recent case and decision of the United States Court of Appeals for the Fifth Circuit in support of the questions presented by petitioners and in direct conflict with the decision of the Supreme Court of the State of Georgia in the instant case.

A substantial Federal question presented in the petition for Writ of Certiorari is whether the acts of the County Board of Commissioners in meeting in private and changing their prior vote and taking new zoning action without the prerequisite of new notice and hearing deprives petitioners as affected property owners and residents herein of due process and equal protection in violation of Article XIV, Section 1 of the United States Constitution. In deciding essentially the same question the United States Court of Appeals for the Fifth Circuit held that the adjudicative decision inherent in tract rezoning requires the decision maker (County Board of Commissioners) to adhere to concepts of minimal due process; and that a decision by the Commissioners denying rezoning by recourse to non-record evidence denied the appellants procedural due process in violation of Article XIV, Section 1 of the United States Constitution. South Gwinnett Venture, et al., v. Pruitt, et al., -F.2d- (5th Cir.) (Decided April 4, 1973, Companion Case Nos. 71-3420, 71-3421) (Appendix A, infra).

Petitioners understand that a petition has been filed in this Court for review of the decision of the United States Court of Appeals for the Fifth Circuit in South Gwinnett Venture, et al. v. Pruitt, et al., (Appendix A, infra).

Petitioners respectfully submit that the granting of the petition for a Writ of Certiorari in this case is necessary to resolve the conflict between the decision of the Supreme Court of the State of Georgia in the instant case and the decisions of the United States Court of Appeals for the Fifth Circuit and of this Court that present

a well settled line of decision condemning administrative action by recourse to non-record evidence in violation of the concepts of minimal due process.

Review of the substantial Federal questions in this case by this Court is in the public interest as the questions are now twice presented in this Court and are likely to continue to be presented in other cases involving zoning administrative actions and the fundamental rights of due process and equal protection to be afforded those affected thereby.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 1973, three copies of the Supplemental Brief of Petitioners to Petition for A Writ of Certiorari to the Supreme Court of the State of Georgia were mailed, postage prepaid, to each party separately represented in the proceeding and required to be served pursuant to Rule 33 (1) and (3), Rules of the Supreme Court of the United States.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3420

SOUTH GWINNETT VENTURE, a partnership composed of South Gwinnett Apartments, Inc., ET AL,
Plaintiffs-Appellants,

versus

W. R. (DUDGE) PRUITT, ET AL,
Defendants-Appellees.

No. 71-3421

ROCKBRIDGE ASSOCIATES, LTD.,
a Georgia Limited Partnership,
Plaintiff-Appellant,

versus

W. R. (DUDGE) PRUITT, ET AL,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Georgia

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(April 4, 1973)

2 SOUTH GWINNETT VENTURE v. PRUITT

Before WISDOM and INGRAHAM, Circuit Judges and BOOTLE, District Judge.

INGRAHAM, Circuit Judge: These appeals arose from suits filed in the district court by the respective plaintiffs, each against the Commissioners and the Chief Building Inspector of Gwinnett County, Georgia, each praying that certain portions of the zoning ordinance enacted by the Commissioners be declared unconstitutional and that the Chief Building Inspector issue building permits for the constructions of apartments upon the subject property. The district court dismissed the suits upon the motions of the defendants, holding that the rezoning applications called for a quasi legislative judgment by the zoning board, and as such the district court was without subject-matter jurisdiction to review the actions for anything more than arbitrariness and interest on the part of the board members.

The use of non-record secret evidence by the Gwinnett County Commissioners in denying appellants' application for the rezoning of certain tracts of land from single family residential classification to multi-family apartment use designations has projected purely local land use questions into a federal forum.

Contending that their applications had been denied by the Commissioners on evidence dehors the record and that the Commissioners' reliance on such evidence deprived them of due process, the appellants brought suit against the County Commissioners in federal district court asserting jurisdiction under 28 U.S.C. § 1331(a). The district court, noting that fed-

eral courts are properly loathe to stretch their limited jurisdiction to become super zoning boards of appeal, found the denial of an application for rezoning to be a quasi-legislative act. As such, the court reasoned it was not impermissible for the quasi-legislators to use non-record materials in exercising their judgment. Consequently, the court dismissed appellants' complaint. 341 F.Supp. 703 (N.D.Ga., 1971).

We differ in only one salient regard from the decision of the district court. Our difference concerns the nature of an application for the rezoning of a tract of land. As we recently noted in *Higginbotham v. Barrett*, ____ F.2d ____ (5th Cir., 1973) [No. 72-1526, February 14, 1973]:

> "The law is settled that the zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis. *Shenk v. Zoning Commission of the District of Columbia*, D.C. Cir., 1971, 440 F.2d 295, 297; *Diedrich v. Zoning Commission of the District of Columbia*, D.C. Cir., 1967, 393 F.2d 666; *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 8 Cir., 1969, 413 F.2d 762, 766-7. Cf. *Goldblatt v. Town of Hempstead*, 1962, 369 U.S. 590, 594-5, 82 S.Ct. 987, 8 L.Ed.2d 130."

The adoption of a legislative plan for the entire community must be distinguished from the treatment which a specific tract of land receives when its owner

petitions for reclassification under that plan. As the record in this case demonstrates, consideration of that petition is an exercise of legislative power in a case by case adjudicative setting. *Compare, Londoner v. Denver,* 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co. v. State Board of Equalization,* 239 U.S. 441 (1915). *See, Hot Shops, Inc. v. Clouser,* 231 F.Supp. 825 (D.C., 1964), affirmed 346 F.2d 834 (D.C.Cir., 1965); and *Donovan v. Clarke,* 222 F.Supp. 632 (D.C., 1963). Cf. *State ex rel Ludlow v. Guffey,* 306 S.W.2d 552 (Mo., 1957); *Morton v. Mayor and Council of Clark Township,* 102 N.J. Super. 84, 245 A.2d 377 (1968). *See, generally,* K. Davis, Administrative Law Text. Thus distinguished from the legislative action of adopting a comprehensive zoning plan, the adjudicative decision inherent in tract rezoning requires the decision maker to adhere to concepts of minimal due process. *Hornsby v. Allen,* 326 F.2d 605 (5th Cir., 1964); *Hot Shops, Inc. v. Clouser, supra; Donovan v. Clark, supra.* Here, appellants' complaint alleged that rezoning of the property had been denied by the Commissioners without a statement of their reasons and by recourse to evidence which was not in the record. Such administrative action has long been condemned, *Morgan v. United States,* 304 U.S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292 (1937); *United States v. Abilene & Southern Ry. Co.,* 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville & Nashville RR Co.,* 227 U.S. 88 (1913); *Hornsby v. Allen, supra,* and we do so here.

The orders of the district court are REVERSED and the causes REMANDED for proceedings consistent herewith.

BOOTLE, District Judge, dissenting:

I respectfully dissent. I would affirm for all reasons stated by the Trial Court in his memorandum opinion, *Rockbridge Associates, Ltd. v. Pruitt*, 341 F. Supp. 703 (N.D. Ga. 1971), plus an additional reason to be stated. I agree with the Trial Court "that plaintiff was afforded procedural due process in connection with the various hearings before local zoning authorities" and that "there is nothing to indicate that the decision of the Commissioners could be found to be arbitrary." The majority opinion groups these two cases together and over-reacts, I think, to the contention of one of the plaintiffs that as to it the County Commissioners in star chamber fashion used non-record secret evidence. I, naturally, have examined that charge carefully. First, it must be noted that only Rockbridge Associates, Ltd. makes this contention. South Gwinnett Venture's case was considered by the Commissioners on November 24, 1970, and again on December 1, 1970, and there is no contention that any secret evidence was used in the consideration of that case. The Rockbridge case was considered by the Commissioners earlier on August 25, 1970 and September 9, 1970, and it is in connection with these earlier hearings that Rockbridge claims the use of secret evidence. Secondly, I think this charge is unsubstantiated. What happened is this: at the August 25, 1970 hearing one of the Commissioners moved to "table the decision for two weeks so that he could obtain additional studies and consult with the Engineering Department." This does not sound star chamberish. His intentions were announced in open meeting. The postponement was for two weeks. The Engineering Department of Gwinnett County is proba-

bly not so large that plaintiffs could not have ascertained whatever information it furnished the Commissioners had they so desired. Nor does any reason appear why they did not inquire at the resumed hearing on September 9, 1970 as to what additional studies, if any, the Commissioners had obtained. Rockbridge argues that the Commissioners have refused to disclose the contents of their conversation with the Engineering Department and the additional studies. Nothing in the record substantiates this argument. Nor was there any request by plaintiffs for any more complete or detailed findings of fact by the Commissioners. All this suggests that plaintiffs' desire to make a federal case exceeded their fear of deprivation of due process.

An additional reason not specifically assigned by the Trial Court for dismissing the complaint is failure of the plaintiffs to exhaust their administrative remedies. While a litigant normally need not exhaust his state "judicial" remedies, normally he must exhaust his state "legislative" or "administrative" remedies before challenging state action in federal court. *See* Wright, Federal Courts, § 49, p. 187 (2d ed.). Under the applicable zoning ordinance plaintiffs had the right to appeal to the Zoning Board of Appeals from any decision of the Chief Building Inspector, and said Board of Appeals is empowered:

> "1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by the Chief Building Inspector in the enforcement of this Zoning Resolution.

"2. To hear and decide requests for the Special Exceptions of the Zoning Resolution upon which the Zoning Board of Appeals is required to pass.

"3. To authorize, upon appeal in specific cases, such variances from the terms of the Zoning Resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the Zoning Resolution will, in an individual case result in unnecessary hardship, so that the spirit of the Zoning Resolution shall be observed, public safety and welfare secured and substantial justice done. Such variances may be granted in such individual cases of unnecessary hardship upon a finding by the Zoning Board of Appeals that:

"a. There are extraordinary and exceptional conditions pertaining to the particular property in question because of its size, shape or topography, and

"b. the application of the Resolution to this particular piece of property would create an unnecessary hardship, and

"c. such conditions are peculiar to the particular piece of property involved, and

"d. such conditions are not the result of any actions of the property owner, and

"e. relief, if granted, would not cause substantial detriment to the public good nor impair the purposes or intent of this Resolution, and

"f. no variance may be granted for a use of land or building or structure that is prohibited by this Resolution.

"4. In exercising the above powers, the Zoning Board of Appeals may, in conformity with the provisions of this Resolution, reverse or affirm, wholly or partly, or may modify the order, requirements, decisions or determination from which the appeal is taken and, to that end, shall have all the powers of the Chief Building Inspector from whom the appeal is taken and may issue or direct the issuance of a Building or Occupancy permit."

The foregoing itemization of instances in which Zoning Board of Appeals might grant variances f the terms of the Zoning Resolution when read in nection with Article I of the Zoning Resolution sta its objectives:

". . . [F]or the purposes of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; of lessening congestion in the streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the overcrowding of land, avoiding both undue con-

centration and urban sprawl; facilitating the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; protecting property against blight and depreciation; encouraging the most appropriate use of land, buildings and other structures throughout the County; securing economy in government expenditures; and for other purposes, all in accordance with a comprehensive plan for the development of Gwinnett County, the County Commissioners of Gwinnett County do hereby ordain and enact into law the following Articles and Sections of the Zoning Resolution of Gwinnett County, Georgia"

fully answers plaintiffs' contention of lack of standards. *See Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

Granted that what is unquestionably a legislative function, the adoption of a general zoning plan or the zoning of an entire area, becomes, next day, to some extent a judicial function, when one of the affected property owners petitions for relief from the zoning restriction, certainly the metamorphosis is not complete. What was all legislative one day remains at least quasi-legislative the next day. *See Higginbotham, Etc. v. Barrett, Et Al.*, ____ F. 2d ____ (5th Cir. 1973) [No. 72-1526, February 14, 1973], and *Donovan v. Clarke*, 222 F. Supp. 632 (D.C. 1963). The requirements of procedural due process are not procrustean. The Supreme Court said in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 1236 (1961) ". . . consideration of what procedures due process may re-

quire under any given set of circumstances must begi with a determination of the precise nature of the gov ernment function involved as well as of the privat interest that has been affected by governmental ac tion." See also *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed 2d 287 (1970). In *Dixon v. Alabama State Board o Education*, 294 F. 2d 150 (5th Cir. 1961), it was hel that in some instances, to-wit: suspension of student from a tax-supported college, procedural due proces does not require "a full-dress judicial hearing, wit the right to cross-examine witnesses." Under the fact of this case it was not an infirmity of Constitutiona proportions for one of the Commissioners to mov for an adjournment of two weeks stating his intentio to obtain additional studies and consult with the Eng neering Department, particularly since no objectio was voiced by petitioners at the public hearing a which that announcement of intention was made, an since no effort was made by plaintiffs to obtain infor mation as to the content of such studies or consultatio until after the filing of this suit.

Public hearings were held. Plaintiffs attended. A least one of them, South Gwinnett Venture, was ac companied and represented by counsel. The othe plaintiff, whether or not accompanied and represente by counsel, fully participated in the public hearing b presenting evidence.

The Trial Court recognized that plaintiffs were e titled to due process and concluded specifically tha they had not been deprived thereof. A hearing was hel in the court below at which plaintiffs clarified thei contentions and the facts in the case. Thus the cou

was not acting solely on pleadings but was fully informed. The complaints were dismissed not for lack of jurisdiction but for failure to present any substantial federal question.

As was said in *Confederacion de la Raza Unida v. City of Morgan Hill*, 324 F. Supp. 895 (N.D. Calif. 1971): "the courts have traditionally recognized that zoning matters are of particular concern to, and the province of, the local communities involved and . . . should interfere with the judgment of the local authorities only in the most extreme cases, and under the most extreme circumstances. This attitude goes back at least as far as *Village of Enclid v. Amber Realty Co.*, 272 U.S. 365 . . . ." And it was said in *Donovan v. Clarke, supra*, at 634: "Such a determination (on the petition of a resident for a change in the zoning of his property) is subject to review by the courts, not on the merits of the issues presented, but as to whether the action was justified or was capricious, arbitrary, unreasonable or discriminatory." And this court said in *Higginbotham, Etc. v. Barrett, et al., supra*, "The law is settled that the zoning of property, *including* the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis." (Emphasis added). The quoted holding indicates that zoning *in general*, and not just the preparation of comprehensive land use plans is a legislative function.

Even in a criminal trial where the requirements of due process are *strictissimi juris* a perfect trial is not demanded, only a fair trial. *Lutwak v. United States*,

344 U.S. 604, 97 L. Ed. 593 (1953); *United States v. Rhoden*, 433 F. 2d 598 (5th Cir. 1972).

The case of *Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825 (D.C. 1964), relied upon by appellants is easily distinguishable on two grounds: first, there the Board of Zoning Adjustment violated the detailed regulations governing its own procedure; and, second, the members of the Board conducted an inspection of the premises and failed to set forth the facts which it claimed it discovered as a result of the inspection. The court said "plaintiff did not know that such inspection had taken place, and had no opportunity to question or refute the results of such inspection." That is not the case *sub judice*. Our appellants knew that one Commissioner planned to obtain additional studies and to consult with the Engineering Department prior to the next meeting. It would have been an easy matter for our appellants to have attended the next regular meeting, to have requested that Commissioner to inform them as to exactly what new information, if any, he had obtained through the additional studies and from his consultation with the Engineering Department, and to have requested, if needed or desired, an opportunity to refute the same.

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